

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 114

SPONSOR: Governmental Oversight & Productivity Committee and Education Committee and Senator Clary

SUBJECT: Public Records and Meeting Exemptions

DATE: March 29, 2004 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Dormady</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
4.	<u>                    </u>	<u>                    </u>	<u>RC</u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

Committee Substitute for Committee Substitute for SB 114 creates a new public records exemption for certain records held by the Florida Institute of Human and Machine Cognition that are trade secrets. The bill also creates an exemption for those portions of meetings at which the records made exempt by the bill are discussed. The differences between the proposed committee substitute and the committee substitute are grammatical and technical only.

This bill creates a new section of the Florida Statutes.

As this bill creates a new public records and public meetings exemption, passage requires a two-thirds vote of each house of the Legislature.

## II. Present Situation:

The Institute for Human and Machine Cognition, Inc. (IHMC) was established in 1990 as an interdisciplinary research institute located in Pensacola, Florida. It is operated by a non-profit corporation that was created by law in 2003, and is affiliated with the University of West Florida. The Institute employs more than 115 researchers and staffers. The IHMC focuses on human-centered computing research, which includes knowledge modeling and sharing, adjustable autonomy, advanced interfaces and displays, communication and collaboration, computer-mediated learning systems, intelligent data understanding, software agents, expertise studies, work practice simulation, and knowledge representation. The IHMC reports that they have received more than \$24 million in funding from various government and private sources. IHMC

partners include NASA, the Army, the Navy, the Air Force, DOT, Sun Microsystems, Boeing and IBM.<sup>1</sup>

The IHMC is currently subject to the public records and public meetings requirements set forth in s. 119.07(1) and s. 286.011, F.S. and s. 24 and s. 24(b) of Art. I of the Florida Constitution. These provisions require that: (1) meetings of public boards or commissions be open to the public, reasonable notice of the meetings be given and minutes of the meetings be taken; and (2) public records<sup>2</sup> be open to inspection by any person, under reasonable conditions. The only exceptions are those established by law or by the Florida Constitution.

### **Florida Constitution: Exemptions from Public Records and Public Meetings Requirements**

Article I, s. 24(c) of the Florida Constitution authorizes the Legislature to create exemptions from public access and public meetings provisions of the law and constitution. Any law that creates such an exemption must:

- State with specificity the public necessity that justifies the exemption;
- Be no broader than necessary to comport with the stated public necessity; and
- Relate only to the exemptions and their enforcement.

### **Sunset and Review of Exemptions**

The Open Government Sunset Review Act of 1995 specifies additional conditions under which a public records or public meetings exemption may be created.

By law, an exemption may be created or expanded only if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including but not limited to a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>3</sup>

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<sup>1</sup> Reported on the IHMC website at: [www.ihmc.us](http://www.ihmc.us)

<sup>2</sup> Section 119.011, F.S., defines a “public record” broadly to include “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

<sup>3</sup> Section 119.15(4)(b), F.S.; While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another. *See Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974). The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., makes explicit that:

The Open Government Sunset Review Act of 1995 provides for the automatic five year review and repeal of an exemption provided under the Public Records Act.<sup>4</sup> If the Legislature intends to reenact the new exemption or the substantial amendment of an existing exemption, the Legislature must act to reenact it in the fifth and final year of the exemption period; otherwise, it stands repealed on October 2 of that year.

### III. Effect of Proposed Changes:

Committee Substitute for Committee Substitute for SB 114 provides exemptions for the IHMC from the public records requirements detailed above. General categories of exempt information provided for in the bill include:

- Materials that relate to methods of manufacture or production, potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., and proprietary information received, generated, ascertained, or discovered during the course of research.
- Identity and all information regarding donors or prospective donors to the institute.
- Information otherwise confidential by law.
- Information received from another state or nation or the Federal Government that is exempt.

Other governmental entities shall be permitted the ability to inspect or copy such exempt information in order to perform their duties.

Committee Substitute for Committee Substitute for SB 114 also makes those portions of meetings of the governing board of the IHMC exempt from the public meetings requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution, where records made exempt by the bill are discussed.

#### **Statement of Public Necessity**

The basis for the exemption is that unrestricted public access to the information, proceedings and hearings relating to the IHMC's scientific research, reports and contract and grant activities: (1) might damage the success and intellectual property development of the institute if made available to its competitors; and, (2) could substantially affect the willingness of federal and foreign agencies to contract with the IHMC. Reports and research of the IHMC may constitute trade secrets that give the IHMC a competitive advantage in the private market. Additionally, the disclosure of donor information or personnel information could have a chilling effect on donations and recruitment, respectively.

The bill also states that the ability of the IHMC to secure outside contracts and grant activity is a public benefit. Providing confidentiality for these records and proceedings would permit the IHMC to be more open in the information provided for these purposes without the fear that provision of the information would result in public dissemination of information that could be used to harm the institute and its members.

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... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

<sup>4</sup> See s. 119.15, F.S.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:*****Constitutional Provisions***

The constitutional right of access (inspect or copy) to public records that exists under s. 24 of Article 1 of the Florida Constitution applies to the legislative, executive, and judicial branches of government, counties, municipalities and districts. The right of access extends to constitutional officers, boards, and commissions, or any entity created pursuant to law or the Constitution. The exemption can be no broader than necessary to accomplish the purpose of the law.

Along with other exemptions, this bill exempts “business transactions resulting from such research.” This broad language may be considered constitutionally suspect under s. 24, art. 1.

***Statutory Authority***

Section 119.01(2), F.S., defines “agency” to include:

“ . . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, *and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency [emphasis added].*”

Art. I, s. 24(a), of the State Constitution, establishes a constitutional right of access to records, including records of the legislative, executive and judicial branches of government.

The Florida Supreme Court has established a “totality of factors” test in determining when a private entity is acting on behalf of a public agency.<sup>5</sup> The totality of factors that are considered by the courts are:

1. The level of public funding;
2. Commingling of funds;
3. Whether the activity is conducted on publicly-owned property;
4. Whether services contracted for are an integral part of the public agency’s chosen decision-making process;

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<sup>5</sup> *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992). *See also Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So.2d 277, 229 (Fla. 3d DCA 1998), in which a private company operating state university bookstores is an “agency” as defined in s. 119.011(2), F.S., notwithstanding the language in the contract with universities that purported to deny an agency relationship.

5. Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
6. The extent of the public agency's involvement with, regulation of, or control over the private entity;
7. Whether the private entity was created by the public agency;
8. Whether the public agency has a substantial financial interest in the private entity; and
9. For whose benefit the private entity is functioning.

The Attorney General's Office has issued numerous opinions advising that if a nonprofit entity is created by law, it is subject to ch. 119, F.S.,<sup>6</sup> as well as s. 286.011, F.S., the public meetings law.<sup>7</sup>

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Unknown.

C. Government Sector Impact:

Unknown.

**VI. Technical Deficiencies:**

None.

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<sup>6</sup> Florida Windstorm Joint Underwriting Association, a private nonprofit association established pursuant to a plan adopted by rule of the Department of Insurance in accordance with statutory authorization, AGO 94-32; Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County as an instrumentality of the county to provide assistance in the funding and administration of certain governmental programs, AGO 94-34; Rural health networks, established as nonprofit legal entities organized to plan and deliver health care services on a cooperative basis pursuant to s. 381.0406, F.S., Inf. Op. to Ellis, March 4, 1994; South Florida Fair and Palm Beach County Expositions, Inc., created pursuant to ch. 616, F.S., AGO 95-17.

<sup>7</sup> See, e.g., AGO 92-80 in which open meetings requirements were found to apply to Enterprise Florida, Inc.; AGO 97-17 in which open meetings requirements were applied to a not-for-profit corporation created by a city; AGO 98-55, in which a nonprofit organization incorporated pursuant to the Community Care for the Elderly Act was found to be required to comply with open meetings requirements.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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